

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Petition for Preemption of Article 52 of)	MB Docket No. 17-91
the San Francisco Police Code Filed by)	
the Multifamily Broadband Council)	

REPLY COMMENTS OF THE FIBER BROADBAND ASSOCIATION

The Fiber Broadband Association (“FBA”)¹ hereby submits reply comments in opposition to the Petition for Preemption (“Petition”)² filed by the Multifamily Broadband Council (“MBC”). The Petition, if granted, would undermine the goals of consumer choice and increased competition furthered by Article 52 of the Police Code of San Francisco (“Article 52”).³

None of the commenters supporting the Petition demonstrated that Article 52 conflicts with the Federal Communications Commission’s (“Commission”) inside wiring rules for multiple dwelling units (“MDUs”) or that the Commission’s interest in regulating MDU inside wiring warrants preemption of the longstanding authority of states and localities to regulate landlord-tenant relationships in their jurisdictions to enhance competition, including through mandatory access laws.⁴ To the contrary, the Commission has acknowledged that authority in the past and

¹ The FBA, formerly the Fiber to the Home Council, is a not-for-profit trade association that provides advocacy, education, and resources to service providers, equipment vendors, organizations, and communities about the value and deployment of all-fiber networks. The FBA’s mission is to accelerate deployment of all-fiber access networks by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. FBA’s members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content provider companies, as well as traditional service providers, utilities, and municipalities. The FBA has approximately 250 members, which are listed at: <http://www.fiberbroadband.org/OurMembers>.

² Petition for Preemption, Multifamily Broadband Council, MB Docket 17-91 (filed Feb 24, 2017) (“Petition”).

³ Article 52 of the S.F. Police Code, Ordinance No. 250-16.

⁴ See *Telecomms. Servs. Inside Wiring, et al.*, CS Docket No. 95-184 *et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3698-99, para. 79 (1997); *Telecomms. Servs. Inside Wiring, et al.*, CS Docket No. 95-184 *et al.*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1358, para. 39 (2003) (“2003 Wiring Order”).

should do so again here. In addition, some commenters' claims that Article 52 will deter investment by service providers and prevent quality service in MDUs lack support and ignore Article 52's express protections for property owners and incumbent service providers. Finally, Article 52 advances consumer rights by preventing incumbent service providers and property owners from cutting off access to competing services. The Commission has never asserted jurisdiction over property owners in the area of inside wiring access by competing service providers, leaving states and localities with ample room to adopt mandatory access laws like Article 52.⁵ The Commission therefore should reject the Petition.

I. THE RECORD PROVIDES NO BASIS FOR PREEMPTING ARTICLE 52

The comments supporting the Petition, like the Petition itself, all fail to provide any cognizable justification for the Commission to forsake its well-established acknowledgment that state and local governments have the authority to regulate property owners and promote competitive service offerings through mandatory access laws; the Commission has never intervened and preempted such local ordinances.⁶ Supporters of the Petition nonetheless presume that, for instance, the Commission must intervene to protect MBC's business model⁷ or that the Commission "should" protect "established, mutually beneficial relationships."⁸ By avoiding discussion of the Commission's authority to intervene and preempt, the supporters effectively confirm that the Petition is nothing more than a "Hail Mary" effort.

⁵ Comments of the Fiber Broadband Association, MB Docket No. 17-91, at 13 (filed May 18, 2017) ("Comments of FBA").

⁶ See *id.* at 13-22 (explaining that Article 52 is consistent with federal law and that the Commission defers to states and localities regarding property owner regulation and the landlord-tenant relationship).

⁷ See, e.g., Comments of Direcpath, LLC, MB Docket 17-91, at 2-3 (filed May 18, 2017); Comments of Gigamonster, LLC, MB Docket No. 17-91, at 2-3 (filed May 18, 2017) ("Comments of Gigamonster"); Comments of Vicidiem, Inc., MB Docket No. 17-91, at 2-4 (filed May 17, 2017); Comments of Data Stream, Inc., MB Docket No. 17-91, at 2-3 (filed May 18, 2017).

⁸ Comments of Camden Property Trust, MB Docket No. 17-91, at 5 (filed May 18, 2017) ("Comments of Camden").

The Commission recently rejected MBC's attempted application of its Over-the-Air-Reception-Devices rule ("the OTARD Rule") to shield its membership from competition.⁹ In so doing, it stated:

Ultimately, the OTARD Rule exists to enable consumers to use the services of their choosing free from undue restrictions imposed by property owners or governmental authorities, and not to protect the ability of any particular service provider to secure financing by excluding others.¹⁰

Like the OTARD Rule, the Commission's inside wiring rules were intended to foster competition and consumer choice.¹¹ Significantly, Article 52 does not undercut the Commission's inside wiring rules, but rather enhances the Commission's efforts to promote competition and consumer choice consistent with San Francisco's unquestioned authority to regulate property owners and landlord-tenant relationships within its jurisdiction.¹² Therefore, preemption of Article 52 would cut the other way and serve to stunt the advancement of the goals underlying the Commission's inside wiring rules.

The Commission should not give weight to the mischaracterizations or erroneous interpretations of Article 52 that appear in comments supporting the Petition. Many commenters supporting the Petition misstate the impact of Article 52 on property owner rights.¹³ To the contrary, as the City of San Francisco confirms, Article 52 provides significant protections for property owners, allowing them to refuse access to new entrants for reasons of limited space,

⁹ See Letter from Maria Mullarkey, Assistant Division Chief, Policy Division, Media Bureau, FCC, to Bryan N. Tramont, Esq., Wilkinson Barker Knauer, LLP, counsel for MBC, DA 17-421 (May 4, 2017).

¹⁰ *Id.* at 3.

¹¹ See Comments of FBA at 17 (citing the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 521(4), (6)); 2003 Wiring Order, 18 FCC Rcd at 1346, para. 7 (finding inside wiring rules "facilitate[e] competitive entry by providers offering diverse information sources and services").

¹² Comments of FBA at 2.

¹³ See, e.g., Comments of the National Apartment Association, MB Docket No. 17-91, at 5-6 (filed May 17, 2017) (claiming Article 52 undermines property owners' traditional role as protectors of their tenants and their authority to manage space in their MDUs) ("Comments of NAA").

safety, and interference with incumbent service providers and other essential services.¹⁴ Furthermore, as FBA and CALTEL explain at length in their comments, Article 52's wiring provision does not force sharing of wires and only takes effect under a narrow – but important – set of circumstances in which the property owner's (not the incumbent provider's) existing wiring lies fallow after a resident discontinues the incumbent's service due to an exclusive wiring arrangement.¹⁵ Disregarding the plain language of Article 52, which leaves no doubt as to the targeted nature of the ordinance's applicability, certain commenters decry the prospect of an "infinite possible number of Service Providers creat[ing] a wild-west situation."¹⁶ Petition-supporting commenters also refer to what they describe as Article 52's supposed "forced sharing"¹⁷ of inside wires and a "wire sharing requirement"¹⁸ that allegedly will degrade or disconnect existing services.¹⁹ But as FBA previously explained, nothing in Article 52 mandates

¹⁴ Opening Comments of the City and County of San Francisco, MB Docket No. 17-91, at 7 (filed May 18, 2017) (quoting Article 52 § 5206(b)); Comments of FBA at 2-3.

¹⁵ See Comments of FBA at 19-20, 23-24 (discussing how Section 5206(b)(5)(C) of Article 52 protects incumbent services by allowing property owners to deny competitive access to wiring if the proposed new installation would "have a significant, adverse effect on the continued ability of existing communications service providers to provide services at the property"); Comments of CALTEL, MB Docket No. 17-91, at 16-19 (filed May 18, 2017) (stating Article 52 does not require incumbent providers to relinquish or share cable inside wire with competitors seeking to provide service to an occupant).

¹⁶ Comments of RealtyCom Partners, MB Docket No. 17-91, at 4 (filed May 15, 2017).

¹⁷ See Comments of NCTA - The Internet & Television Association, MB Docket No. 17-91, at 4 (filed May 18, 2017) ("Comments of NCTA").

¹⁸ See Comments of the National Multifamily Housing Council, MB Docket No. 17-91, at 12-14 (filed May 18, 2017) (discussing the technical impact of wire sharing) ("Comments of NMHC").

¹⁹ NAA's suggestion that competing service providers will use Article 52 to gain access to "all available space in a building," which presumably includes an MDU's inside wiring and media room, and "warehous[e]" this access right without providing any service is without merit. See Comments of NAA at 7. First, NAA provides no evidence that such warehousing occurs in any of the multiple jurisdictions with mandatory access laws. See Comments of FBA at 5, n. 15 (summarizing mandatory access laws of 18 states and the District of Columbia). Second, a competing service provider's access right under Article 52 only is triggered after a MDU resident requests service from that provider and the competing provider sends a written notice of intent to provide service to the property owner. Article 52 §§ 5204(c)(1)(B), 5205. NAA fails to support its assumption that the competing provider would not provide the requested service or abide by the notice of intent once it gained access to the MDU. Third, the property owner may deny competing service providers access if the new installation would adversely impact incumbent services. See Article 52 § 5206(b). Finally, property owners may require competing providers to conform to reasonable access conditions and agree to remove their facilities and equipment from the premises

wire sharing. Further, to ensure that existing services will not be degraded or disconnected, the San Francisco ordinance provides numerous protections for incumbent services that are absent from other mandatory access laws.²⁰

In the remainder of these reply comments, FBA responds to three policy points made in comments supporting the Petition which have no basis and which, in some cases, the Commission considered and rejected in prior proceedings.

A. Article 52 Will Not Deter Investment by Service Providers

Numerous commenters assert that, without the ability to recoup their investment by erecting barriers to competitive entry through exclusive wiring arrangements, service providers will have reduced incentives to obtain financing and invest in MDU infrastructure and deployment.²¹ The Commission considered and rejected essentially the same argument in its 2007 Exclusivity Order.²² Responding to claims that exclusive service arrangements promote investment, the Commission found that “there is no evidence in the record, other than generalities and anecdotes, that incumbent MVPD providers couple exclusivity clauses with significant new investments”²³ When banning exclusive arrangements in the 2007 Exclusivity Order, the Commission found that “exclusivity clauses deny MDU residents the benefits of increased competition, including lower prices,” and access to new service offerings.²⁴

upon discontinuation of service. Article 52 § 5207(b). Consequently, a building owner can force a competing service provider to leave the MDU if the provider does not provide service to a resident.

²⁰ Comments of FBA at 2-3, 14.

²¹ See, e.g., Comments of NCTA at 3; Comments of Spot On Networks, LLC, MB Docket No. 17-91, at 3-4 (filed May 17, 2017); Comments of Gigamonster at 2; Comments of Prometheus Real Estate Group, Inc., MB Docket No. 17-91, at 2-3 (filed May 18, 2017); Comments of AvalonBay Communities, Inc., MB Docket No. 17-91, at 4-5 (filed May 18, 2017) (“Comments of AvalonBay”).

²² *Exclusive Serv. Contracts for Provision of Video Servs. in Multiple Dwelling Units and Other Real Estate Devs.*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) (“2007 Exclusivity Order”).

²³ *Id.* at 20250, para. 28.

²⁴ *Id.* at 20248, para. 26.

The Commission added “[w]e do not wish to deny MDU residents these benefits based on incumbents’ alleged need to be shielded from additional competition.”²⁵ As the 2007 Exclusivity Order made clear, incumbent service providers have no federally protected interest in preventing competition and thwarting the commensurate benefits competition brings to consumers.²⁶

The Commission’s conclusion in the 2007 Exclusivity Order is equally applicable here. Commenters supporting MBC provided no evidence that exclusive wiring arrangements promote investment or impact financing. As such, the Commission should again reject such investment claims and allow San Francisco residents to reap the competitive benefits offered by Article 52.

B. Exclusive Wiring Arrangements Are Not Necessary to Provide Quality Service

Several commenters assert that Article 52 prevents incumbent providers from providing top-quality service to MDUs.²⁷ According to these commenters, certain incumbent providers agree to maintain, repair, replace, and upgrade inside wiring in exchange for exclusive use of such wiring.²⁸ The commenters claim that these providers rely on the guaranteed subscriber base that comes with exclusive wiring arrangements to justify maintaining and upgrading their MDU facilities and imply that without exclusivity these measures will not be taken.²⁹ First, this assertion posits a false nexus between maintenance/upgrade revenues and exclusive rights, and ignores the fact that incumbent providers could maintain, replace, repair, and upgrade

²⁵ *Id.* at 20249, para. 26.

²⁶ *Id.* at 20249-50, para. 28.

²⁷ See, e.g., Comments of AvalonBay at 4; Comments of Camden at 6; Comments of Consolidated Smart Systems, LLC, MB Docket No. 17-91, at 6 (filed May 15, 2017); Comments of NCTA at 6; Comments of NMHC at 7-8.

²⁸ See, e.g., Comments of AvalonBay at 4.

²⁹ See, e.g., Comments of NMHC at 7.

wiring without erecting such high barriers to competitive entry. Further, Article 52 only applies when the property owner's existing wiring is left fallow after a resident discontinues an incumbent's service.³⁰ After such discontinuance, inside wiring is unlikely to be actively upgraded or maintained by the incumbent. Again, nothing in Article 52 mandates sharing of wiring or encourages competing service providers to "free ride" on an incumbent provider's facilities. Second, this assertion flies in the face of the Commission's understanding of the benefits of competition. As the Commission observed in the 2007 Exclusivity Order, exclusive arrangements do not promote good, let alone state-of-the-art, service, but rather "insulate the incumbent from any need to improve its service."³¹ Even if, assuming *arguendo*, exclusive arrangements somehow directly result in better maintenance of MDU facilities in some instances, "a practice which harms a significant number of [residents] in this country warrants remedial action even if it does not harm everyone."³²

C. Exclusive Wiring Arrangements Obfuscate Consumer Rights

As FBA discussed in its opening comments, "post-termination" exclusive wiring arrangements amount to an end run around the Commission's existing cable inside wiring rules, which were created to promote competition and consumer choice.³³ While such arrangements may arguably clarify the rights between the property owner and service provider insofar as they grant exclusive rights to the property owner's infrastructure to a single preferred provider (as certain commenters argue),³⁴ they undermine MDU resident choice. By putting formal title to inside wiring into the hands of the property owner, but giving incumbents exclusive control over

³⁰ Comments of FBA at 19.

³¹ 2007 Exclusivity Order, 22 FCC Rcd at 20250, para. 28.

³² *Id.* at 20251, para. 29.

³³ See Comments of FBA at 20-21 (citing Carl Kandutsch Law Office, *Exclusive Use of Inside Wiring Clauses in Cable ROE Agreements* (May 2, 2014), available at <http://www.kandutsch.com/blog/exclusive-use-of-inside-wiring-clauses-in-cable-roe-agreements> (last visited June 9, 2017)); 47 C.F.R. § 76.802.

³⁴ See Comments of AvalonBay at 4; Comments of Camden at 4.

its use, these arrangements are aimed at avoiding the Commission's wiring disposition rules designed to provide competitive access to incumbent provider wiring in the event a resident terminates the incumbent provider's service.³⁵ Such an outcome would clearly be at odds with the intent, if not the letter, of the Commission's inside wiring rules, frustrate application of those rules, and undermine consumer rights to gain access to competitive offerings. Subject to protections for existing services, Article 52 prevents a property owner from interfering with a new provider's use of existing wiring irrespective of an exclusive license granted to an incumbent provider in effective contravention of the Commission's directives.³⁶

³⁵ See Susan Crawford, *Dear Landlord: Don't Rip Me Off When it Comes To Internet Access*, Backchannel (June 27, 2016), available at <https://backchannel.com/the-new-payola-deals-landlords-cut-with-internet-providers-cf60200aa9e9#.5pqcb96dq> (last visited June 9, 2017) (noting that Time Warner Cable "worked around" FCC rules "by deeding ownership to their inside wires to the building owner, and then getting an exclusive license back from the owner to use those wires"); see also Comments of FBA at 20-21 (discussing wiring leaseback arrangements).

³⁶ Article 52 § 5201(a).

II. CONCLUSION

The record in this proceeding provides no basis for preempting Article 52. Article 52, rather than conflicting with the Commission's rules and policies, enhances them and advances competition and consumer choice. Accordingly, for the reasons set forth herein and in FBA's initial comments, the Commission should deny the Petition.

Respectfully Submitted,

FIBER BROADBAND ASSOCIATION



Heather Burnett Gold
President and CEO
Fiber Broadband Association
6841 Elm Street #843
McLean, VA 22101
Telephone: (202) 365-5530

June 9, 2017